Supreme Court U.S.
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No. 06-___

IN THE

Supreme Court of the United States

JAMES E. BROWN, SR.,
Petitioner,

v.

DR. JAMES G. ROCHE,
Secretary, USAF
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Honorable Court abandon the "*Feres* doctrine" originating from *Feres v. U.S.*, 340 U.S. 165 (1950)?

II. *Feres v. U.S.*, 340 U.S. 135 (1950) should not bar dual status National Guard technicians from pursuing ADEA discrimination cases. [The Federal Circuit Courts of Appeals are split as to application of *Feres* in these situations].

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DR. JAMES G. ROCHE,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

In 1999, James E. Brown, Sr., ("Mr. Brown"), an Air Force National Guard civilian technician, filed a *pro se* discrimination claim, using the Age Discrimination in Employment Act, (ADEA), 28 U.S.C. § 623(d), [App. A at 2a].[1] The basis for this claim is that Mr. Brown was passed over for a promotion that was given to a younger, less qualified, candidate for the job. [*Id.*] Initially, an Administrative Law Judge, ("ALJ"), ruled in Mr. Brown's favor in a decision rendered on August 30, 2004. [*Id.* at 3a and App. C at 27a]. On the 1st day of July, 2004, the U.S. Air Force reversed the

[1] All exhibits/opinions from the lower courts discussed herein were unpublished opinions.

ALJ's decis[illegible] [App. A at 2a]. A timely lawsuit was filed in the United States District Court for the Middle District of Tennessee. [*Id.*]. The Middle District dismissed the case for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and *Feres v. U.S.*, 340 U.S. 135 (1950) on the 26th day of September, 2005. [App. A at 2 and App. B]. The matter was timely appealed to the United States Court of Appeals for the Sixth Circuit. [App. A at 3a]. The Sixth Circuit handed down a November 1, 2006, decision which upheld the Middle District's opinion dismissing this case on the *Feres* doctrine and Fed. R. Civ. P. 12(b)(1). ["App. A"]. Mr. Brown now *respectfully* presents this *certiorari* petition to this Honorable Court.

STATEMENT OF JURISDICTION

This matter is reviewable pursuant to Sup. Ct. Rule 10(a) & (c) as well as the federal question jurisdiction of 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS INVOLVED

The U.S. Constitution's Vth Amendment Due Process and Equal Protection clauses impact this case. The "Separation of Powers" of the branches of government is also impacted by this case.

STATEMENT OF THE CASE

The facts of this case are fairly straight-forward. They are as follows:

1) James E. Brown, Sr. was employed by the Tennessee Air Force National Guard as a civilian technician at Berry Field in Nashville, Tennessee in 1998. [App. A at 2a].

2) 32 U.S.C. § 709(b) defines technicians as a "dual status" employee—meaning that a technician is both a civilian employee and maintains membership in the

military reserves as a condition of employment as discussed in 10 U.S.C. § 10216. [App. A at 2a].

3) In December, 1998, fifty-seven (57) year old Mr. Brown applied for a position that opened at Berry Field as a Quality Assurance Specialist, ("QAS"). [App. A at 2a]. The QAS position was filled by a man in his mid-thirties with less experience than Mr. Brown. [*Id.*].

4) In September, 1999, Mr. Brown filed a *pro se* age discrimination suit under the ADEA. Initially, an ALJ ruled in Mr. Brown's favor, but the Air Force reversed said findings. [App. A at 2a to 3a].

5) Suit was filed in the U.S. District Court for the Middle District of Tennessee. The case was dismissed under Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction. [App. A at 2]. The District Court's decision to dismiss for lack of subject matter jurisdiction was upheld by the Sixth Circuit citing *Feres v. U.S.*, 340 U.S. 135 (1950). [App. A at 4].

ARUGMENT

ISSUE I: Should this Honorable Court abandon the "*Feres* doctrine" originating from *Feres v. U.S.*, 340 U.S. 135 (1950)?

To say that the *Feres* doctrine was one of the more unpopular decisions handed down by the U.S. Supreme Court would be a gross understatement. "Four Justices now believe *Feres* was wrongly decided." [*Atkinson v. U.S.*, 825 F.2d 202, 206 (9th Cir. 1987)].[2] "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received". [*U.S. v. Johnson*, 481 U.S. 681, 682 (1987), Scalia, J., dissenting]. *Feres* is frequently questioned and Mr.

[2] The Justices referred to by the Ninth Circuit are Scalia, Brennan, Marshall and Stevens. [Johnson, 481 U.S. at 659].

Justice Scalia has been credited with the resolve to eventually kill the flawed *Feres* doctrine and to place the doctrine on the U.S. Supreme Court's "Wall of Shame" next to *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Dred Scott v. Sandford*, 60 U.S. 393 (1857). [*See*, *Taber v. Maine*, 67 F.3d 1029, 1043 fn. 9 (2nd Cir. 1995), citing *Johnson*, 481 U.S. at 692-703, Scalia, J., dissenting]. The Second Circuit explicitly noted a blatant need for guidance and requested guidance from this Honorable Court on how to apply *Feres*. [*Id.*].

The Ninth Circuit's Judge Ferguson pulled no punches in attacking *Feres* declaring:

> I begin this dissent with the understanding that I and this Court of Appeals must abide by the decisions of the Supreme Court. I write to demonstrate that the *Feres* doctrine is unconstitutional and to present the Supreme Court with a case and controversy in order for it to be able to review the doctrine. . . . I believe that the *Feres* doctrine violates the equal protection rights of military service men and women. I also believe that *Feres* violates our constitutional separation of powers.

[*Costo v. U.S.*, 248 F.3d 863, 870 (9th Cir. 2001) Ferguson, J., dissenting]. Other federal circuit courts have described applying and following *Feres* as ". . . complicated by the imprecise contours of the doctrine enumerated in *Feres*. . ." [*Hunt v. U.S.*, 636 F.2d 580, 582 (D.C. Cir. 1980)]. Several Circuits, noting either concern or distain with the results *Feres* produces, have noted that if the problem is to be fixed, this Honorable Court is the only body that can fix it. Here are just a few of the Circuits' comments:

A) ". . . although many courts have expressed reservations about the continuing validity of the broad *Feres* doctrine, only the United States Supreme Court can overrule or modify *Feres*." [*LaBash v. U.S. Dept. of Army*, 668 F.2d 1153, 1156 (10th Cir. 1982)];

B) ". . . although *Feres* remains a controversial decision, we are bound by the Supreme Court's continual adherence to it." [*Kohn v. U.S.*, 680 F.2d 922, 925 (2nd Cir. 1982)];

C) *Feres* is a "blunt instrument". [*Bozeman v. U.S.*, 780 F.2d 198, 200 (2nd Cir. 1985); *Accord, Jones v. LaRiviera Club, Inc.*, 655 F.Supp. 1032, 1033, fn. 6 (D.P.R. 1987)];

D) ". . . *Feres* itself deserves re-examination by the Supreme Court. A few of *Fere's* original reasons no longer seem so persuasive." [*Day v. Massachusetts Air National Guard*, 167 F.3d 678, 683 (1st Cir. 1999)].

E) The ". . . tasks, [of correcting the *Feres* doctrine], if it is to be undertaken at all, is properly left to the Supreme Court or to Congress." [*Atkinson v. U.S.*, 825 F.2d 202, 206 (9th Cir. 1987)];

F) "The reasoning for the *Feres* decision has frequently been questioned and has in fact been felt to have been eroded." [*Schwager v. U.S.*, 279 F.Supp. 262, 263 (E.D. Pa. 1968)].

Just this quick look at *Feres* has five (5) different Circuits calling on this Honorable Court to reconsider *Feres*.

In explaining the historic problems with *Feres*, the Second Circuit described said decision by declaring, ". . . *Feres* quickly lurched toward incoherence." [*Tabor v. Maine*, 67 F.3d 1029, 1039 (2nd Cir. 1995)]. The Second Circuit went on to opine that one option ". . . would be to agree with Justice Scalia's dissent in *Johnson* and to admit that *Feres* is a mistake—was perhaps always a mistake—and should be scrapped. That option is, of course, not open to us." [*Tabor*, 67 F.3d at 1043]. The Second Circuit did note that the Eleventh Circuit in *Elliott v. U.S.*, 37 F.3d 617 (11th Cir. 1994), came close to a *de facto* overruling of *Feres*. [*Taber*, 67 F.3d at 1043 fn. 9]. "*Feres* has been regularly—albeit

inconsistently—applied by the Supreme Court, and the mere existence of a convincing dissent in a closely divided Court cannot alter its binding force." [*Taber*, 67 F.3d at 1043]. In closing the *Tabor* opinion, the Second Circuit noted that even if the *Feres* doctrine could be made workable, that does not suggest that this Honorable Court should not follow Justice Scalia's suggestion to abandon the *Feres* doctrine. [*Taber*, 67 F.3d at 1044 fn. 11]. Clearly, the United States Courts of Appeals are begging this Honorable Court, in unison, to re-examine *Feres*.

The U.S. District Court sitting in Puerto Rico directly and bluntly joined the wide-spread criticism of the harsh *Feres* doctrine. [*Jones v. LaRiviera Club, Inc.*, 655 F. Supp. 1032, 1037 (D.P.R. 1987)]. Interestingly, even military courts have noted that *Feres* gives draconian results to military personnel. Here are a few examples:

A) *Feres* applies differently to active duty military and reservists who are not on active duty. [*Duncan v. Usher*, 23 M.J. 29, 32 (C.M.A. 1986)];

B) An appointed attorney for a soldier or sailor facing a military courts-martial cannot seek malpractice relief against said attorney if the attorney is inept or incompetent. [*U.S. v. Ortiz*, 24 M.J. 323, 324 (C.M.A. 1987)];

C) "Unlike civilians, military prisoners have no civil remedy for alleged constitutional violations" {while being detained}. [*U.S. v. White*, 54 M.J. 469, 472 (CAAF 2001), citing *Feres* and other cases].

D) "We recognize that military service members are unable to pursue relief under 42 U.S.C. § 1983 as a result of the extended *Feres* . . . doctrine". [*U.S. v. Moreno*, 63 M.J. 129, 139 (CAAF 2006)].

Professor Jonathan Turley, of the George Washington School of Law, has referred to *Feres* as ". . . one of the most extraordinary examples of the Court acting as a 'super-

legislature'. Not only has this doctrine been used to fundamentally alter both the legal status of service members and the liability of the military . . . It has been used in cases where the military acted in violation of the most basic international human rights provisions." [*Turley*, "Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity In the Military System of Governance", 71 Geo. Wash. L. Rev. 1, 68 (Feb., 2003)][3] Professor Turley sums up the whole of the *Feres* doctrine's cancerous impact on American jurisprudence by stating, "The *Feres* doctrine continued to produce bizarre and disturbing rulings for the Court." [Pax Militeris at 10].

Respectfully, this Honorable Court, should hear the cry of multiple federal courts on both the circuit and district court levels, as well as the cry of soldiers yearning for justice, and grant *certiorari* to abolish or vastly revise *Feres v. U.S.*, 340 U.S. 135 (1950). As this Honorable Court has noted to the lower federal courts, if there are to be departures from prior Supreme Court precedents, said departures should come for the U.S. Supreme Court alone. [*See e.g., Khan v. State Oil Co.*, 93 F.3d 358, 1363 (7th Cir. 1996), *rev'd on other grounds*, 527 U.S. 3 (1997)]. Plato said, "To do injustice is more disgraceful than to suffer it." [*Reader's Digest*, "Quotable Quote" at 23 (May, 1992)]. *Feres* has been allowed to inflict enough injustice on the American military! *Certiorari* should be granted!

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[3] Hereinafter, "Pax Militaris".

ISSUE II: ***Feres v. U.S.*, 340 U.S. 135 (1950) should not bar dual status National Guard technicians from pursuing ADEA discrimination cases. [The Federal Circuit Courts of Appeals are split as to the application of *Feres* to these situations].**

"[T]he *Feres* doctrine is a judicially created exception to the broad congressional waiver of soverign immunity contained in the FTCA. . . *Feres* precludes members of the armed forces from maintaining an FTCA action where the 'claimant, while on active duty and not on furlough, sustained injury due to the negligence of others in the armed forces' . . .The injury must arise out of or be sustained in the course of activity 'incident to [military] service'." [*Jones v. LaRiviera Club, Inc.*, 655 F.Supp. 1032, 1034 (D.P.R. 1987)]. Professor Turley explains *Feres* by saying, ". . . there is no evidence that *Feres* serves any meaningful purpose beyond protecting the government from the financial pressures of liability." [*Pax Militeris*, at 90]. The key focus of whether *Feres* applies to a civilian's case, such as Mr. Brown's case, is whether or not the matter is "incident to service".

The "incident to service" standard has been described as "elusive" and a "repository of ambiguity". [*Millang v. U.S.*, 817 F.2d 533, 535 (9th Cir. 1987)]. This Honorable Court has noted concern regarding stretching *Feres* to other areas of tort/contract law. [*Boyle v. United Technologies Corp.*, 487 U.S. 500, 510 (1988)]. The "incident to service" question allows civilians to bring suit against the government for military related events, but would bar similar claims by military personnel. [*Id.*]

The Sixth Circuit dismissed Mr. Brown's case under the *Feres* doctrine, actually a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. [App. A at 2a]. Appellate courts view *Feres* dismissals as a motion to dismiss and the appellate court accepts as true the plaintiff's alle-

gations set forth in a complaint and further give all, reasonable and favorable inferences that can be deduced from the allegations set forth in the pleadings to the plaintiff. [*Williams v. City of Boston*, 784 F.2d 430, 433 (1st Cir. 1986)].

Exceptions to the application of the *Feres* doctrine have been made for some medical malpractice situations. [*See e.g., Del Rio v. U.S.*, 833 F.2d 282, 287 (11th Cir. 1987)]. On the contrary, the Sixth Circuit, in Mr. Brown's case, opined that *Feres* is an absolute bar, no exceptions. [App. A at 3a to 4a]. *See also*, *Persons v. U.S.*, 925 F.2d 292, 297 (9th Cir. 1991)]. Interestingly, the Seventh Circuit found both ways on a single case, eventually resolving the matter in favor of *Feres* having no exceptions. [*See*, *Persons*, 925 F.2d at 297 fn. 11, citing *West v. U.S.*, 729 F.2d 1120, 1125 (7th Cir. 1984), vacated by *West v. U.S.*, 744 F.2d 1317 (7th Cir. 1984) (*en banc*)].

The Sixth Circuit has held that discrimination cases under 42 U.S.C. § 2000e-16 never supersede the *Feres* doctrine in an action by a National Guard technician, even if the alleged discrimination arises in the course of his or her civilian employment. [*Overton v. N.Y. Div. of Military & Naval Affairs*, 373 F.3d 83, 94-95 (2nd Cir. 2004), citing *Fisher v. Peters*, 249 F.3d 443, 443-444 (6th Cir. 2001)].

The Ninth Circuit, in *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995) held that suits by National Guard technicians over discrimination claims are never justifiable. [*But see*, *Overton*, 373 F.3d at 95 fn. 12]. A contrasting view comes from the Fifth Circuit which holds that 42 U.S.C. § 2000e-16 explicitly, but only partially, overrides the *Feres* doctrine in discrimination situations. [*Brown v. U.S.*, 227 F.3d 295, 299 (5th Cir. 2000). *Accord*, *Overton*, 373 F.3d at 95]. The Second Circuit, like the Fifth Circuit, specifically place their findings at odds with the Sixth and Ninth Circuits on the issue of whether or not National Guard technicians can bring discrimination suits if the suit has *any* military nexus. [*Overton*, 373 F.3d at 95, citing *Luckett v. Bure*, 290 F.3d 493, 499 (2nd

Cir. 2002)]. Clearly, there is a split among the Circuits on this very important question. *Certiorari* should be granted to address this issue.

Now, turning to the case at hand, the ALJ found that the sole reason Mr. Brown was passed over for his QAS promotion was age discrimination. [App. C at 27a]. The ALJ found that both Mr. Brown *and* the Respondent/U.S. were acting in civilian, not military capacities at the time Mr. Brown was suffering justifiable age discrimination. [App. D at 30a].

Since Fed. R. Civ. P. 12(b)(1) cases are viewed in the light most favorable to the plaintiff, and a split in Circuits exist, and *Feres* is not necessarily viable or applicable to the case at hand; *certiorari* should be granted. As noted by the ALJ, this Court's decision in *Tennessee v. Dunlap*, 426 U.S. 312 (1976), a National Guard technician case, seems to support an exception to *Feres*. [App. D at 31a fn. 1]. *Certiorari* should be granted.

CONCLUSION

Plato said, "What is honored in a country will be cultivated there."[4] The military is a vital and respected part of American's past, present and future. An important Vth Amendment Due Process and Equal Protection question regarding the rights of civilians associated with the military should be addressed by this Honorable Court. Further, this case presents a strong separation of powers question which deserves this Honorable Court's consideration. As noted by many Circuit decisions, this Honorable Court is the *only* court that can "fix" *Feres*. An overwhelming number of the Federal Circuits join this request asking *certiorari* to be granted. [*See e.g.*, *LaBash v. U.S. Dept. of Army*, 668 F.2d

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[4] L. Peter, *Peter's Quotations* at page 240 (William Morrow & Co., Inc. 1977)

1153, 1156 (10th Cir. 1982) and *Atkinson v. U.S.*, 825 F.2d 202, 206 (9th Cir. 1987)]. *Certiorari* should be granted.

This is the 29 day of January, 2007.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Nov. 1, 2006]

No. 06-5001

JAMES E. BROWN, SR.,
Plaintiff-Appellant,

v.

DR. JAMES G. ROCHE, Secretary,
Department of the U.S. Air Force,
Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

OPINION

Before; MOORE, ROGERS, and GIBSON,* *Circuit Judges.*

KAREN NELSON MOORE, *Circuit Judge.* Plaintiff-Appellant James E. Brown, Sr. ("Brown") appeals the district court's dismissal of his claim that the Air Force National Guard's (the "National Guard") failure to promote him violated the Age Discrimination in Employment Act ("ADEA"). When a younger and allegedly less qualified applicant was chosen over Brown for a supervisory position, Brown, a National Guard technician, filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC").

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* The Honorable John R. Gibson, *Circuit Judge* of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

At the conclusion of the administrative adjudication process, the agency determined that no discrimination had occurred, and Brown then filed the instant suit. The district court granted the Air Force's motion to dismiss for lack of subject matter jurisdiction on the ground that, became Brown's position was a military one, his action is barred. Brown now appeals that ruling.

I. FACTS AND PROCEDURE

Brown was employed by the Air Force as a National Guard technician (a "technician") at Berry Field in Nashville, Tennessee. Technicians are employed in "(1) the administration and training of the National Guard; and (2) the maintenance and repair of supplies issued to the National Guard or the armed forces." 32 U.S.C. § 709(a). As a technician, Brown was required by statute to serve in both civilian and military capacities—in, that is, a "dual status." § 709(b).

[A] military technician (dual status) is a Federal civilian employee who—

> (A) is employed under . . . section 709(b) of title 32;
>
> (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
>
> (C) is assigned to a civilian position as a technician in the administration and training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

10 U.S.C. § 10216.

In December 1998, the National Guard announced that it had a vacancy for a Quality Assurance Specialist ("QAS") at Berry Field. Brown, who was then fifty-seven years old, applied for the position. He was granted an interview, but the job was eventually awarded to Clay Crabtree who was in his mid-thirties. In September 1999, Brown filed a pro se age

discrimination complaint with the National Guard Bureau. Although administrative law judge ("ALJ") found that the National Guard had violated the ADEA, the agency later reversed that determination and issued a Final Agency Decision finding that Brown had not suffered age discrimination. Brown then filed suit in the United States District Court for the Middle District of Tennessee which subsequently granted the National Guard's motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil. Procedure 12(b)(1). Brown now appeals that ruling.

II. ANALYSIS

"We . . . review de novo the district court's decision to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Howard v. Whitbeck*, 382 F.3d 633, 636 (6th Cir. 2004). In this case, the district court dismissed Brown's claim on the ground that *Feres v. United States*, 340 U.S. 135 (1950), prohibits federal courts from adjudicating employment discrimination claims brought by employees of the United States armed forces. The district court reasoned that the federal courts repeated refusal to exercise jurisdiction over discrimination claims brought under other federal statutes indicates that the *Feres* doctrine applies to ADEA claims as well

In *Feres*, the Supreme Court held that, because "the relationship of military personnel to the Government has [historically] been governed exclusively by federal law," the courts "cannot impute to Congress . . . [,] in the absence of express congressional command," the intent to authorize civil suits against the government by members of the armed services. 340 U.S. at 146; *see also Major v. United States*, 835 F.2d 641 (6th Cir. 1987) (applying *Feres*). Although *Feres* and *Major* involved the Federal Tort Claims Act, 28 U.S.C. § 1346, subsequent cases have expanded the *Feres* doctrine to encompass, inter alia, discrimination claims brought under Title VII 42 U.S.C. §§ 2000e *et seq.*, *see Fisher v. Peters*, 249

F.3d 433, 437-38 (6th Cir. 2001), and claims for the violation of constitutional rights brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *see Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

Brown argues that the *Feres* doctrine does not apply to his ADEA claim because he asserts that claim in his civilian, not his military, capacity. As the government points out, however, we have held that the National Guard technician position is "irreducibly military" for purposes of the *Feres* doctrine. *Fisher* 249 F.3d at 439 ("The district court was correct in observing that [e]very count having occasion closely to consider the capacity of National Guard technicians has determined that capacity to be irreducibly military in nature, and we are satisfied that Col. Leistiko's technician job was of this nature.") (internal quotation marks and citation omitted; alteration in original). We therefore conclude that the *Feres* doctrine, as applied in *Fisher*, bars Brown's action.

III. CONCLUSION

Because the *Feres* doctrine applies to Brown's ADEA claim that claim is barred. We therefore AFFIRM the district court's dismissal of this action.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Filed Sept. 26, 2005]

Case No. 3:04-1090
Judge Trauger

JAMES E. BROWN, SR.,
Plaintiff,

v.

DR. JAMES G. ROCHE, Secretary,
Department of the U.S. Air Force,
Defendant,

MEMORANDUM

Pending before the court is the defendant's Motion to Dismiss and to Strike Plaintiffs Request for Compensatory Damages and a Jury Trial. (Docket No. 8) The plaintiff has responded to this motion (Docket No. 12) and the defendant has replied (Docket No. 14). For the reasons discussed herein, the defendant's motion will be granted.

FACTUAL BACKGROUND AND
PROCEDURAL HISTORY

At all times relevant to his claim, the plaintiff was employed as a civilian technician in the Tennessee Air National Guard.[1] Specifically, he worked as a WL-10 Inspection Dock

[1] Unless otherwise stated, the facts have been drawn from the plaintiffs Complaint (Docket No. 1) and from his Response to the defendant's Motion to Dismiss and to Strike Plaintiffs Request for Compensatory Damages and a Jury Trial (Docket No. 12).

Supervisor, which required him to lead a crew of between seven and thirty employees in the inspection of aircraft. As required by the terms of his civilian employment in the National Guard, the plaintiff also held a corresponding National Guard military position. (*See* Docket No. 12, Ex. C at 18:4-8); *see also* 32 U.S.C. § 709 (2000) (listing requirements for employment as a military technician). The terms of the plaintiff's "dual-status" employment dictated that, while performing his duties, he had to "wear the uniform appropriate for [his] grade and component of the armed forces." § 709(b)(4), (*see also* Docket No. 9 at 3).

On January 19, 1999, the plaintiff, who was then fifty-six years old, requested a lateral transfer from his Inspection Dock Supervisor position to a vacant GS-09 Quality Assurance Specialist position. (Docket No. 12, Ex. A at 4) The selecting official denied his transfer request. The plaintiff then submitted an application for the position as part of the general applicant pool. In total, ten men applied for the position and met its minimum qualifications. The selecting official ultimately hired Clay Crabtree, an applicant who, at age thirty-seven, was one of only two applicants under the age of forty.

These events led the plaintiff to file a discrimination complaint with the Equal Opportunity Employment Commission. An administrative judge held a full hearing and, on July 1, 2004, issued a decision finding that the defendant had discriminated against the plaintiff on the basis of his age. The National Guard Bureau of Tennessee reversed this decision on September 28, 2004.

On December 8, 2004, the plaintiff filed a Complaint in this court alleging that the defendant had discriminated against him in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 633a (2000) (hereinafter "ADEA"). On February 28, 2005, the defendant moved to dismiss the plain-

tiff's Complaint and to strike his request for compensatory damages and a jury trial. (Docket No. 8)

ANALYSIS

1. Motion to Dismiss Standard

The defendant in this case has moved for dismissal based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). This court is bound to consider the 12(b)(1) motion first, as the 12(b)(6) challenge becomes moot if subject matter jurisdiction is lacking. *See Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946) (finding that a motion to dismiss for failure to state a cause of action may be decided only after the establishment of subject matter jurisdiction because determination of the validity of the claim is itself an exercise of jurisdiction)).

On a motion to dismiss pursuant to Rule 12(b)(1), the party claiming subject matter jurisdiction bears the burden of establishing it by a preponderance of the evidence. *Moir*, 895 F.2d at 269; *Farmer v. Tenn. Air Nat'l Guard*, No. 2574-D/P, 2005 WL 2177004, slip op. at *2 (W.D. Tenn. Sept. 2, 2005). When the facts presented to the district court give rise to a factual controversy over the existence of subject matter jurisdiction, the court must "weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist." *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). In resolving this controversy, the court has "wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* With these guidelines in mind, the court turns to an examination of the jurisdictional issues at hand.

2. Subject Matter Jurisdiction

The plaintiff in this case attempts to meet his burden of establishing this court's subject matter jurisdiction by noting

that, "while the government was able to convince the Sixth Circuit" that federal courts do not have jurisdiction over claims such as the one he hopes to assert here, "the vast majority of the country holds otherwise." (Docket No. 12 at 5) Even if the "vast majority" of the other circuits were of this mind, which the plaintiff has not demonstrated to be the case here, the simple fact that the Sixth Circuit has determined otherwise necessarily determines this court's decision.

Indeed, the Sixth Circuit has indicated a strong reluctance to hear claims asserted by members of the military. In *Major v United States*, it noted that "review of . . . Supreme Court precedents makes it clear that, in recent years, the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military . . . ." 835 F.2d 641, 644 (6th Cir. 1987) (emphasis in original); *see Feres v. United States*, 340 U.S. 135, 146 (1950) (holding that the government "is not liable under the Federal Torts Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service"); *see also Stone v. Groves*, No. 3:01CV-419-H, 2001 WL 1772119, at *4 (W.D. Ky. Dec. 21, 2001) (unpublished) (noting that "a long line of Supreme Court and Sixth Circuit precedent articulates the doctrine" that certain claims by members of the military "are nonjusticiable in federal district court").

Since its decision in *Major*, the Sixth Circuit has repeatedly determined that federal courts lack jurisdiction to enforce various employment discrimination statutes when such statutes serve as the basis of a claim asserted by a member of the military. *See, e.g., Fisher v. Peters*, 249 F.3d 433, 443-44 (6th Cir. 2001) (lacking jurisdiction to hear a Title VII claim); *Leistiko v. Stone*, 134 F.3d 817, 820-21 (6th Cir. 1998) (lacking jurisdiction to hear a claim under the Rehabilitation Act); *Bradley v. Stump*, No. 97-1472, 1998 WL 385903, at *3 (6th

Cir. July 1, 1998) (unpublished) (lacking jurisdiction to hear a § 1983 claim, among others).

Notably, these decisions all involved claims brought by a plaintiff who, like the plaintiff in this case, served as a National Guard technician. Each of the plaintiffs in these cases attempted to argue, as does the plaintiff here, that as a military technician, rather than a full-time member of the armed forces, she or he was entitled to bring her claim in the federal courts. In each case, however, the Sixth Circuit held that such access was not available to military technicians because, despite the civilian components of the job description,[2] such positions were "irreducibly military" in nature. *Fisher*, 249 F.3d at 439; *Leistiko*, 922 F.3d at 820-21; *Bradley*, 1998 WL 385903, at *3. As such, the technicians were precluded from bringing their suits in civilian courts. *Fisher*, 249 F.3d at 443-44 (directing the plaintiff to military channels); *Leistiko*, 922 F.3d at 820-21; *Bradley*, 1998 WL 385903, at *3.

Although neither of the parties in this case raises this point, it is worth noting that the Sixth Circuit has never specifically addressed the efforts of a military technician to bring an ADEA claim such as the one the plaintiff asserts here. That court's rejection of previous technicians' claims under other employment discrimination statutes, however, compels this court to make a similar decision here. For the reasons that follow, we find particularly persuasive the Sixth Circuit's rejection of the plaintiff's Title VII claims in *Fisher*. *See Fisher*, 249 F.3d at 443.

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[2] The military technician position involves service both as a federal civilian employee and as a member of the National Guard. *See* 10 U.S.C. § 10216(a) (2000) ("a military technician . . . is a [f]ederal civilian employee who . . . is assigned to a civilian position as a technician . . ."); 32 U.S.C. § 709(a)-(b)(4) (2000) ("a person employed under [this] subsection must . . . [b]e a member of the National Guard . . . [and] wear the uniform appropriate for the member's grade and component of the armed forces").

Title VII and the ADEA contain nearly identical language governing employment discrimination by the military. Both statutes prohibit discrimination in "all personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5 . . . ." 42 U.S.C. § 2000e-16(a) (2000); 29 U.S.C. § 633a(a). A number of circuit courts have found that this duplication of statutory language indicates that, like Title VII causes of action, ADEA claims cannot be raised in federal courts by members of the military reserves. *See Kawitt v. United States*, 842 F.2d 951, 953 (7th Cir. 1988) ("We agree with the Ninth Circuit that [ADEA § 633a(a)] was not meant to extend the protections of the statute to the uniformed personnel, whether active or reserve, of the armed forces."); *Helm v. California*, 722 F.2d 507, 509 (9th Cir. 1983) ("Title VII uses language identical to that in the ADEA to bar discrimination . . . . This court has applied Title VII precedent to ADEA cases . . . . The ADEA does not apply to military reservists."); *see also Quinonez-Cruz v. Diaz-Colon*, No. 97-1677, 1997 WL 704423, at *2 (1st Cir. Nov. 4, 1997) (unpublished) (providing a compendium of cases in which various courts found that the ADEA did not apply to members of the National Guard).

In addition, the Sixth Circuit has enunciated that "claims of discrimination brought pursuant to Title VII . . . and the ADEA . . . are analyzed under the same framework." *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 538 (6th Cir. 2002). The fact that the Sixth Circuit has determined that military technicians may not bring their Title VII claims in federal court, *see Fisher*, 249 F.3d at 443-44, coupled with the identical language of Title VII and the ADEA, as well as other circuits' determinations that claims under both statutes were similarly inaccessible to members of the military, convince this court that military technicians may not bring ADEA claims in the federal courts within the Sixth Circuit.

Accordingly, because the plaintiff's cause of action here arises from his service as a military technician in the Air National Guard, he may not seek relief in this court. As such, this court need not reach any of the parties' remaining claims, but instead must dismiss the plaintiff's case for lack of jurisdiction.

CONCLUSION

The plaintiff has failed to establish this court's subject matter jurisdiction over his claim of age discrimination by the Air National Guard. Thus, the defendant's motion to dismiss plaintiff's claim will be granted.

An appropriate order will enter.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

APPENDIX C

AMENDED STATEMENT OF
FINDINGS AND CONCLUSIONS
IN THE DISCRIMINATION COMPLAINT
OF: James E. Brown v. Dr. James G. Roche,
Secretary of the Air Force and The Tennessee National Guard

EEOC No. 250-2000-008413X

AGENCY No. T-0449-TN-F-02-99-A0

COMPLAINANT:	James E. Brown 94 Paradise Drive Mt Juliet, TN 37122
COMPLAINANT'S REPRESENTATIVE:	Debra A. Wall, Esq. 110 Franklin St., Suite 101 Clarksville, VA 30740
AGENCY:	Department of Defense Tennessee National Guard
AGENCY'S REPRESENTATIVE:	Maj. Brett Rypma, Esq. Office of the State Judge Advocate Houston Barracks 3041 Sideo Drive Nashville, TN 37204
COMPLAINT:	Age Discrimination
ADMINISTRATIVE JUDGE:	Zia C. Schostal Administrative Judge Equal Employment Opportunity Commission 140-7 Union Avenue, Suite 621 Memphis, TN 38104
DATE OF HEARING:	June 29-July 1, 2004
PLACE OF HEARING:	Nashville, TN
DATE DECISION ISSUED:	July 1, 2004

I. INTRODUCTION

James E. Brown, the Complainant, filed the present complaint pursuant to 29 CFR §1614.106, alleging that because of his age (57), the Tennessee National Guard had failed to promote him to Quality Assurance Specialist on or about January 4, 1999, in violation of the Age Discrimination in Employment Act.

The following witnesses appeared at the hearing and gave testimony under oath:

For the Complainant:	James E. Brown Larry Burns James Horn Robert Ragin
For the Agency:	CMS Douglas Lester MSG William Nagey MAJ William R. Wynn Thomas Gober

Each side had requested additional witnesses to testify to the relative qualifications of the Complainant and the Selectee. Witnesses were limited for the reasons set forth in the scheduling order. The Agency had requested CPT Holly Payne to testify to the selection method. However, she was deployed prior to the hearing. The Complainant objected, and it was determined that if CPT Payne's testimony were deemed essential at the end of the hearing, alternative means would be found to secure it. Col. Marvin Riddle, who had been approved as an Agency witness, had retired and was unavailable to testify,

PROCEDURAL HISTORY

The following is a chronology of the events leading to the hearing. The alleged discriminatory act occurred on or about January 4, 1999, the date the selection of an applicant other than the Complainant occurred. On February 18, 1999, the

Complainant sought precomplaint counseling. Counseling was concluded on July 20, 1999. On July 27, 1999, the Complainant filed a formal complaint of discrimination, alleging discrimination based on age (57) and retaliation. The Complainant withdrew his allegation of retaliation after it was found that he had not engaged in activity protected activity prior to filing his complaint.

The complaint was accepted for processing by the Agency on August 27, 1999, and subsequently was investigated. On July 18, 2000, the Complainant requested an evidentiary hearing before the Equal Employment Opportunity Commission. Pursuant to this request, the Agency transmitted the complaint file which was received at the Memphis District Office on August 15, 2000.

During the preheating proceedings, rulings on three substantive motions were made. An Agency motion to dismiss due to election of remedies was denied, An Agency motion for a Decision Without a Hearing was denied, and an Agency motion to dismiss for lack of jurisdiction because the EEOC does riot have jurisdiction under the National Guard Technician's Act was denied.

III. ISSUE(S) CONSIDERED

Prior to the prehearing conference, the Complainant withdrew the retaliation basis. The issue determined for hearing is:

> Was the Complainant discriminated against on the basis of his age when he was not selected for the position of Quality Assurance Specialist, GS-09, on January 4, 1999.

IV. FINDINGS OF FACT

On December 11, 1998, the Agency posted a Vacancy Announcement (266-98) advertising for applicants for a Quality Assurance Specialist, GS-1910-09 (IR Tab 5). On December 10, 1998, the selectee, Clay Crabtree, age 37 (DOB March

28, 1961), who was the TODO Coordinator in Quality Assurance, requested a priority placement for the position based On the abolition of his prior job as an Aircraft Engine Mechanic, WO-8062-10 which had been abolished due to a reduction in force (IR Tab 7). On January 1, 1999, the Complainant (DOB March 29, 1942) requested a lateral transfer from his WL-10 Work Leader position in the ISO inspection dock (IR Tab 8), Crabtree's request was denied by the Agency Human Resources Office after it found that the Quality Assurance position was a higher level position than the one from which he had been riffed (IR Tab 7). The Complainant's transfer request was denied when the RMO, Robert Lester, returned the certificate stating that he wanted to consider additional names (IR Tab 9). On or about January 6, 1999, the Agency issued a list of all applicants who had applied in a timely manner and had met the minimum qualifications for the position. (IR Tab 6.) Both the Complainant and Crabtree were considered with eight other applicants pursuant to the vacancy announcement in question. The applicants were not rated or ranked but were listed in alphabetical order. (IR Tab 9.)

The applicants for consideration were:

		Date of Birth	Age
Albritton, James	Aircraft Mechanic, WG-5378-10	Jan. 13, 1968	31
Brown, James	Aircraft Work Leader, WL-8852-10	Mar. 29, 1942	57
Buck, Jack	Aircraft Mechanic, WG-8852-10	Jun. 7, 1951	47
Crabtree, Clay	TODO Coordinator, GS-0303-06	Mar. 28, 1961	38
Goostree, Jimmy G.	Propulsion Mechanic, WG-8602-10	May 6, 1955	43
Horn, James H.	Aircraft Mechanic, WG-8852-12	Nov. 9, 1952	46

Jeannette, Tony L.	Aircraft Pneu. Sys. Mech., WG-8268-10	Aug. 8, 1956	42
Nickell, James E.	Aircraft Mechanic, WG-8852-12	Apr. 5, 1943	55
Shaw, Leonard R., Jr.	Aircraft Mechanic, WG-8852-10	Mar, 3, 1942	57
Whit, Marcus L.	Aircraft Mechanic, WG-8852-10	Nov. 2, 1949	49
(IR Tabs 9 and 12.)			

Robert Lester, the Quality Assurance Chief, was the selecting official for the position. Mr. Lester interviewed each applicant and used the same questions for each interviewee. A witness was present at each interview to assure the consistency of the questions asked during the interview. Age was not mentioned during any of the interviews. At the end of the selection process, he indicated that he had selected Clay Crabtree to fill the vacant Quality Assurance Specialist position. Mr. Lester stated that the selectee worked for him and that he knew that the Selectee had good communication skills, got along with the other inspectors and knew the computer and paperwork aspects of the job. He said that he selected the best qualified person regardless of age and denied that he considered age when he made his selection.

V. DISCUSSION OF THE EVIDENCE AND LAW

The positions occupied by the Complainant and the Selectee and the position which they both sought were National Guard Technician positions and subject to the jurisdiction of the EEOC so long as the parties were acting in their capacities of technicians. Major Wynns, who was responsible for staffing the position, testified at the hearing that he was staffing a civilian position and that the AFSC (military) requirements

were on the vacancy announcement simply to indicate skill level and experience for the position ("compatibility").

The burden of proof in an age discrimination case rests at all times with the Complainant. In the absence of direct proof of discrimination, the U.S. Supreme Court has devised a construct of shifting burdens of proof by which discrimination may be proved without direct evidence. Initially, the Complainant must offer enough evidence to establish a prima facie case of unlawful discrimination. If the Complainant does so, the burden of production of evidence fails to the Agency to articulate a "legitimate, nondiscriminatory reason" for the alleged discriminatory act. The reason proffered by the Agency must be sufficiently specific to allow the Complainant to produce evidence to rebut it, if the Agency meets its articulation burden, the Complainant must then be afforded the opportunity to establish, by the preponderance of the evidence, that the articulated reason is a pretext for unlawful discrimination. *See: McDonnell Douglas v. Green*, 411 U S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, S. Ct. 10S9 (1981); *United States Postal Service Board of Governors v. Aikens*, 460 U S. 711 (1983); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1983), In an Age Discrimination in Employment Act case, a complainant must show by a preponderance of the evidence that but for the discrimination, he would have been selected but for his age.[1]

The complainant in a promotion case may establish a *prima facie* case by showing that: (1) (s)he is a member of a class which is protected by one of the statutes administered by the EEOC; (2) (s)he applied for a position for which the agency vas seeking applicants; (3) (s)he was qualified for the position; (4) (s)he was not selected; and (4) someone outside of

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[1] Age had "a role in the process and a determinative influence on the outcome." *Hazen* at 610.

the complainant's protected group was selected for the position. *Weinstein v US. Postal Service*, 01830674, 1056/f114 (1983).

At the time that the cause of action arose, the Quality Assurance section had three inspector positions: one specializing in propulsion, one specializing in avionics and ore specializing in general airplane maintenance (IR Tab 13). Robert Lester, the Quality Assurance supervisor and selecting official (RMO), stated that although each Quality Assurance Specialist specialized to an extent, each had to be utilized in all areas. On or about December 11, 1998, the Agency posted a vacancy announcement 0266-98) soliciting applicants for a Quality Assurance Specialist, GS 1910-09. The position was for general aircraft maintenance. The duties and responsibilities of the position included: (1) performing management and compliance reviews over a wide range of specializations within the maintenance complex; (2) conducts quality verification inspections (QVI) of aircraft and engines to assure quality and acceptability standards have been met; (3) provides technical guidance, expertise, interpretation and authoritative reference on methods, techniques and procedures; (4) develops methods for cost reduction programs; (5) develops methods for maximum mission effectiveness; (6) evaluates highly complex support equipment for failures affecting mission accomplishment; (7) reviews and evaluates quality control performance by analyzing inspection reports for area of coverage, adequacy of comments, and recommendations of the quality control inspections, (8) investigates failure trends attributable to design or quality of workmanship of aircraft airframes and components and systems; (9) provides inspection /surveillance support to assure quality and reliability of material, facilities, services and maintenance provided by contractor facilities, depots, SRAs, contract field teams and contract maintenance; (10) monitors system publication improvement and material deficiency reporting programs to include responsibilities outlined in appropriate directives;

(11) administers the functional check flight (FCF) program; and (12) conducts the weight and balance program. (IR Ex #5.)

Relevant skills, knowledge and abilities included: (1) knowledge of quality assurance procedures and methods and pertinent regulatory and guidance material related to the functional activity supported by the quality assurance program; (2) knowledge of pertinent characteristics of the assigned aircraft, the operations or processes affecting critical characteristics test arid inspection techniques, the techniques for assessing operations or processes to detect unsatisfactory conditions; (3) skill in summarizing, analyzing and evaluating quality data to prepare technical reports; (5) skill in interpreting and explaining a variety of technical requirements. (IR Ex #5.) Both the Complainant and the Selectee were found to meet the minimum qualifications for the position and were forwarded to the Selecting Official for evaluation.

Evidence of record shows that the Complainant was born March 29, 1942, making him almost 57 years of age at the time of the selection in question. Therefore, he was a member of a group which fell within the protection of the Age Discrimination Act of 1975 (ADEA). He applied for a position as a Quality Assurance Specialist, GS-09, in response to an Agency vacancy announcement. He was found qualified for the position but was not selected. Instead, Clay Crabtree, whose date of birth was March 28, 1961, and who was under the age of 40 at the time of the selection, was selected to fill the position, The Complainant has proven a prima fade case .of age discrimination which is sufficient to raise an inference of discrimination and to shift the burden of articulating a legitimate nondiscriminatory reason for the selection to the Agency.[2]

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[2] Once the Complainant has established a prima facie case, the burden shifts to the Agency to articulate a legitimate nondiscriminatory reason for

In response to the Complainant's allegation of age discrimination, the Agency has shown that all minimally qualified applicants' names and promotion packages were sent to the selecting official without having been ranked leaving the selecting official free to choose anyone on the list. The Agency has the freedom to select any applicant which it wishes so long as the selection does not result from illicit discrimination. The selecting official, Robert Lester, testified that he interviewed everyone on the list using the same interview questions for each applicant. He stated that he made his selection based on the individuals experience, interview results and what he knew about the applicants by virtue of having worked with them. He told the Agency EEO Counselor that the reason he selected Crabtree was because "I thought he was the best all around person for thin position. I knew that he does good work. He has worked for me for the past couple years and he is the best all around person for this position. One of his strong points is his communication skills . . . you have to have good communications skills for this position, and of course the aircraft experience." (IR Tab CC) During the investigation, Lester was asked why he would select someone who needed additional training rather than someone who did not Lester stated that he felt that the maintenance experience that the selectee had was what they needed in Quality Assurance. He then went on to reiterate,

> Having worked for me, I knew of his skills in writing and communicating with .people. He worked well with the. current inspectors that were already assigned there. He knew the inspection system, the entire paperwork system. Having been the gentleman (who) had come up and set up the new tech order distribution system for the entire base, he had a very broad knowledge of that. I just

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its action. *Texas Dept, of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

felt like all around qualifications, he was the most qualified for the job.

Mr. Lester's testimony at the hearing was consistent with his earlier statements. He testified that after interviewing all of the candidates, he reviewed his notes and reviewed the application packages. He testified that he selected Crabtree based on his oral and written communication skills, computer literacy and attention to detail. He stated that basically a quality assurance inspector must be able to read and interpret technical material and watch and make sure that people were doing the job correctly. He said that there was no requirement for APG (airplane general) training before becoming an inspector. He testified that everyone on the list would have needed additional training.

Based on the above evidence, the Agency has met its burden of articulating a legitimate nondiscriminatory reason for its selection. The Complainant must then meet the burden of showing by the preponderance of the evidence, that the articulated reason is a pretext for unlawful discrimination.. *See: McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, S. Ct. 1089 (1981); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *St. Mary's Honor Center v. Hick*, 113 S. Ct. 2742 (1983). This merges with the Complainant's burden of showing, by a preponderance of the evidence, that but for his age, he would have been selected for the position, i.e., that considerations of age made a difference in the agency's action. *Hazen Paper Company v. Biggins*, 507 U.S. 604 (1993).

The Complainant's evidence of pretext falls into three categories: relative qualifications for the job, statements by others regarding age discrimination allegedly practiced by the RMO, and lack of credibility of the seasons given by the RMO.

First, the Complainant maintains that his qualifications are substantially better than that of the selectee. He specifically states that he had 33 years of experience in aircraft maintenance and repair (APG) and held the highest skill rating to be had. At the tune of the selection he had attained the AFSC certification necessary to perform the job and had an even higher AFSC than required for the Quality Assurance job. In other Words, his experience was totally compatible with the demands of the job. Evidence of record and testimony at the hearing confirmed that the selectee did not hold even the most basic AFSC level in general aircraft maintenance and would have had to be trained in general aircraft maintenance after obtaining the position. The Selectee did possess a high degree of specialization in the propulsion area of the plane. However, the Quality Assurance Specialist position to be filled was that of a general airplane (APG) inspector, Further, the Complainant stated that he had a second area of expertise was in pneumohydraulics In addition to his years of experience as a general airplane mechanic, the Complainant had several years of experience as a Work Leader in the APG area with his own inspection bay. Further, the Complainant testified and his application noted prior experience as an airplane parts inspector in the private sector. Part of his job as a Work Leader (crew chief) entailed receiving, reading, interpreting and seeing that technical orders which governed aircraft repairs were carried out In addition, he was responsible for the correct maintenance of the technical orders pertaining to general airplane maintenance. In other words, in addition to making sure that the technical orders were properly maintained, the Complainant was tasked with understanding and applying the orders.

The Complainant testified that when inspections are conducted by quality assurance inspectors who are not familiar with aircraft maintenance and repair, erroneous reports are generated. The Complainant also stated that after the selection, he had to show the selectee what to do and what to look

for. The Complainant also cited examples regarding the Selectee's lack of knowledge about the aircraft. He claimed that the selectee mistook a life raft bucket for a fuel tank. He also noted that the Selectee did not know what push-pull rods were or that the rods had to he adjusted and queried how the Selectee could inspect them when he did not even know what they were.

According to Lester, he knew that the Selectee was not fully qualified for the position in that he had not obtained the necessary military training (Airplane General AFSC) and that the Selectee had been placed on the referral certificate because he could become qualified after completing the military training. Mr. Lester testified that several other applicants on the register, who were not selected, did have the AFSC certification. Other witnesses testified that promotions are often made although the selectee does not have the AFSC necessary to fully perform the duties of the position. Training takes place after the selectee is in place. However, that does not provide exculpation for tailing to select an applicant with more compatible work experience than that of the Selectee.

Lester stated that he was familiar with the selectee's work and knew him to be a good worker. However, he also knew that the Complainant was a good worker who had received outstanding evaluations through the last three evaluation cycles (IR Tab AA), Such a reason is riot discriminatory in itself He stated that the Selectee got along with the other inspectors. Evidence showed that the Complainant also was well liked and respected by Ws peers and superiors. Lester cited the Selectee's experience as the Technical Order Duty Officer (TORO) in the Quality Assurance section. However, the testimony and the Selectee's application package shows that he was tasked with receiving technical orders, assuring that the correct number of pages had been received, disseminating them to the appropriate persons and then following up with an inspection to assure that they had been

properly filed. As much as it was implied that the TODO, by virtue of its location in the Quality Assurance Office was an inspection position, the Performance Appraisal Forms (IR Tab BE) show that it was a clerical position and the only "inspections" were of the technical order notebooks to assure that the crew chiefs were filing them properly. No real knowledge of aircraft inspections were gained in that position. His knowledge of Quality Assurance paperwork and forms may have exceeded that of the Complainant, but his knowledge of aircraft inspection, the real work of the position, certainly did not. The Complainant's Performance Appraisal Forms and Critical Elements show that he performed inspections as a regular part of his job and that those inspections both discovered maintenance problems and assured that the work had been done properly. In addition, the Complainant oversaw his own inspection bay, and interpreted, comprehended and implemented the technical orders.

Mr. Lester cited the Selectee's ability to communicate as a factor in the selection. However, the Selectee's application package does not show a greater ability to communicate in writing than does that of the Complainant, As far as oral communication is concerned, I was impressed with not only the Complainant but with the ability of all of the witnesses Dom the maintenance area to communicate clearly and credibly. Indeed, all of the witnesses who testified were articulate and. impressive, particularly in the area of the knowledge of their jobs. As to Mr. Lester's assertion that the Complainant had mere knowledge of the forms and more computer literacy, anyone new to the Quality Assurance Section would have to be trained M this area. Mr. Nagey, Training Manager for the Base, testified that it would take about 18 months to train a person without Quality Assurance experience to do the job while it would take three years for someone who had not worked in aircraft general maintenance to do the job. In addition, Mr. Ragin, the Training Manager for the Aircraft Maintenance area stated that it would take more than three

years to complete the required maintenance skill level because someone in quality assurance would not be performing the tasks on a daily basis. Further, this training would take an individual away from his quality inspection duties while he learned the maintenance functions. The evidence of record leaves no doubt that the Complainant was substantially better qualified to perform the duties of a Quality Assurance Inspector than was the Selectee.

Secondly, the Agency Representative emphasized that the Complainant had not been able to show a causal connection between the nonselection and his age. He specifically mentioned a lack of evidence of other charges or accusations of discrimination against the RMO, While I do not give much weight to such evidence, I mention it at this point because it seemed to be important to him. Evidence of record shows that a charge of discrimination based on age had been made against the RMO by Van Maxwell (Maxeell) (IR Tab 12). In addition, in response to questions by the EEO Counselor in this case, statements taken from James Albritton, Larry Barns, and James Horn indicated that they all felt that discrimination had been present in selections made. AU cited age discrimination, and some added other bases. Albritton, Burns, Goostree, Horn, Nagey, and Whitt cited the disparities in experience between the Complainant and the Selectee. (IR Tab E.)

Lastly, Mr. Lester is simply not credible when he maintains that he selected the best all around qualified person for the job. He must have known what is evident to the persons who gave their statements and testimony. The Selectee would take longer to train than the Complainant. The Complainant could have been trained while actually accomplishing the mission of the Quality Assurance Section while training the Selectee would remove him from his QA duties. The Complainant had the respect and good will of the crew chiefs and mechanics while the Selectee would have a difficult time gaining the

respect of the maintenance crews so long as his technical knowledge and skills were less than theirs. His selection based on knowledge of the paperwork above knowledge of aircraft maintenance and repairs as more important qualifications is not in conformity with the mission of assuring that the Base's Aircraft fly properly and safely and can only be seen as specious. Indeed, the Union was so concerned about the selection that it filed a safety grievance protesting the selection of Mr. Crabtree.

The Complainant, despite his superior qualifications, was almost 57 years old at the time of the selection. Three of the ten qualified applicants wore in an age band over 55 years of age. The Complainant was less than 40 years old at the time of the selection. The Complainant testified that he would have been forced ;o retire in three years, at age 60, under the regulations of the National Guard. The Selectee, at age 58, potentially would have had a much longer tenure in Quality Assurance. The experience differences between the Selectee and the Complainant are not merely a matter of longevity but a matter of highly technical skills which must be acquired over time

In addition, the evidence shows that there was a wide variation in the ages of the applicants for the position. Three of the applicants were born in 1942-1943. All had a great deal of experience in the General Aircraft Mechanics area. None of them were selected. Three were born in 1949-1952. All of them bad substantial experience as General Aircraft Mechanics. None of them were selected. Two of the applicants were born 1955-1956. Neither of them had General Aircraft experience, and neither was selected. One of them had experience as a Propulsion Mechanic, the same area of mechanical expertise as the Selectee. The six oldest persons on the selection register had the most directly related experience and were bypassed in order to promote the Selectee.

The Complaint has carried the burden of showing that the Agency's articulated legitimate nondiscriminatory reason for

its action is a pretext for discrimination, and has carried his burden of proof of showing by a. preponderance of the evidence that his age was the determinative factor in the decision not to select him.

VI. CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact and Discussion, I find that the Complainant, James E. Brown, was discriminated against on the basis of his age in violation of the Age Discrimination in Employment Act of 1975.

VII. REMEDIES

The Agency shall restore the Complainant to the position he would have enjoyed had the discrimination not occurred. The Agency shall pay the Complainant the difference between what he would have earned (including pay for any overtime worked by the Selectee) had he been promoted to the Quality Assurance Specialist position at the time the Selectee was promoted until the day of the Complainant's retirement and what the Complainant actually earned during that period excluding any lump sum payments which resulted from his retirement.

VIII. NOTICE

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to C.F.R. §1614.109(b), 109(g) or 109(1). EEOC regulations require the Agency to take final action on the complaint by issuing a final order within 40 calendar days of receipt of the hearing file and this decision. The Agency's final order shall notify the complainant whether or not the Agency will fully implement this decision, and shall contain notice of the complainant's right to appeal to the Commission., the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. With the exception detailed in the

next paragraph, complainant may not file an appeal to the Commission directly from this decision. Rather, complainant may appeal to the Commission within 30 calendar days of receipt of the Agency's final order concerning its implementation of this decision If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C F R §1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached to the final order.

The Complainant may only appeal directly from this decision in the event that the Agency has not issued its final order within 40 calendar days of its receipt of the hearing file. In this event, the complainant should append a copy of the Administrative Judge's decision to the appeal. The complainant should furnish a copy of the appeal to the opposing party at the same time it is Iliad with the Commission, and should certify to the Commission the date and method by which such service was made on the opposing party.

All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director
Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848, Washington, D.C. 20036
Fax No. (202)6634022

Facsimile transmissions over 10 pages will not be accepted.

For further guidance regarding appeals, the parties may consult 29 C.F.R. §1614.401 et seq. and Chapter 10 of the Commission's Management Directive-110. These documents are available on the EEOC's web site at http://www.eeoc.gov

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. §1614.504, an Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. If the complainant believes that the Agency has failed to comply with the turns of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within 30 calendar days of when the complainant knew or should have known of -the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal within 30 calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least 35 calendar days after complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within 30 calendar days of receiving the notice of appeal.

Issued: July 2004
Amended: August 10, 2004

BY: Zia C. Schostal
Zia C. Schostal
Administrative Judge
Memphis District Office

APPENDIX D

Equal Employment Opportunity Commission
Memphis District Office
1407 Union Avenue, Suite 621
Memphis, TN 38104
Tele. (901) 544-0073 or 544-0116
FAX. (901) 544-0111

James E. Brown, Complainant, vs. Donald Rumsfeld, Secretary, Depart- ment of Defense, Agency.	EEOC No.: 250-2000-08413X Agency No.: T-0449-TN-F02-99-A0 Zia C. Schostal, Supervisory Administrative Judge *Order and Notice*

Under consideration is the Agency's Motion To Dismiss for Lack of Subject Matter Jurisdiction, filed on or about May 21, 2004. The Agency contends that the EEOC lacks subject matter jurisdiction over the case because it involves the promotion of a National Guard Technician whose job duties are primarily military in nature (aircraft repair).

I have conducted exhaustive research in this matter and conclude that the subject of this case is a civilian promotion and is, therefore, within the subject matter jurisdiction of the Commission. The Commission does not accept the view that civilian technicians of the National Guard are always within the purview of the Military EEO process. Instead, the Commission takes the position that when the alleged discrimination arises from their capacity as federal civilian employees, the matter is covered by Title VII. There is no doubt that when the civilian employment, be it retention or promotion, is contingent on military retention or promotion, the matter is

not within the purview of Title VII.[1] In such cases, where military rank or retention, whether arbitrary or not, causes adverse actions to occur on the civilian side of the job, the matter is not reviewable outside of the military. *See: Brazill v. National Guard. Bureau*, Appeal No. 01891698 (1989); *Berger v. National Guard Bureau*, Appeal No. 01A33270 (2003).

However, the case before us is not one where the military action has caused civilian actions to be taken. The Complainant appears to have the necessary military rank and training to sustain the civilian selection. The evidence does not indicate that military considerations entered the selection process. The selection was for a General Schedule (civilian) position which was advertised pursuant to OPM guidelines for civilian selections. The fact that the job was one of inspecting military aircraft is not sufficient to remove it from the civilian selection process. Had it fallen within the purview of the military, it would not have been advertised or been a general schedule job but rather would have had a military pay code and rank attached to it.

Clearly, this was a civilian selection within the military context and as such, is within the purview of Title VII of the Civil Rights Act, as amended. Therefore, the Agency's request for dismissal of the case for lack of subject matter jurisdiction is hereby DENIED.

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[1] *In State of Tennessee, et al. v. Dunlap*, 426 U.S. 312 (1976), the employment of a National Guard Technician was ended as a result of his separation from the Guard. The Court held that when such a situation exists, that part of 32 U.S.C.A. §709 which requires that civilian technicians be separated 'Tor cause", has no application and cannot provide a foundation for a claim that the termination of the Technician's employment and the allegedly arbitrary refusal to re-enlist him violated due process.

The hearing will proceed as scheduled at a place to be determined.

IT IS SO ORDERED.

Dated: June 10, 2004

By: Zia C. Schosta
Zia C. Schostal
Administrative Judge

Certificate of Mailing

I certify that the foregoing "Notice and Order" was mailed to the following persons on June 10, 2004.

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Departments of the Army and the Air Force
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/s/ Priscilla Anderson
Priscilla Anderson
Legal Technician